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In the Supreme Court of the United States

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondent.

BRIEF OF RESPONDENTS, UFCW LOCALS 876 AND 539, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Where the National Labor Relations Board, pursuant to statute, authorized a request by its Regional Director for a preliminary injunction based on a probable cause standard, was the respondent (Petitioner here) denied due process because the Board, after an extended due process hearing before an administrative law judge, eventually decided the underlying unfair practice charge on its merits?

The Sixth Circuit held no.

Respondents, UFCW Locals 539 and 876, agree.

LIST OF CORPORATE AFFILIATIONS

Local 876 and Local 539 are both voluntary unincorporated associations. Both are affiliated with the United Food and Commercial Workers International Union, AFL-CIO, CLC.

TABLE OF CONTENTS

COUNTER STATEMENT OF QUESTION PRESENTED i

LIST OF CORPORATE AFFILIATIONS ii

TABLE OF AUTHORITIES iv

COUNTER STATEMENT OF THE CASE 1

ARGUMENT 2

A. The Board Did Not Prejudge Kessel 2

B. Even If The Board Had Made A Preliminary Determination That The Act Was Violated This Would Not Have Deprived Kessel Of Due Process 3

CONCLUSION 6

INDEX OF AUTHORITIES

Cases

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 4

Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975) 3

Eisenberg v. Holland Rantos Co., 234 N.L.R.B. 726, aff'd, 583 F.2d 100 (3rd Cir. 1978) 5

Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1947) 4, 5

Hortonville Dist. v. Hortonville Ed. Assoc., 426 U.S. 482 (1976) 4

Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979) 1, 3

NLRB v. Sanford Homes for Adults, 669 F.2d 35 (2nd Cir. 1981) 5

United States v. Morgan, 313 U.S. 409 (1941) 4

Withrow v. Larkin, 421 U.S. 35 (1975) 3, 4, 5

Statutes

29 U.S.C. §160(j) 1, 2, 3, 5

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COUNTER STATEMENT OF THE CASE

On March 16, 1982, the General Counsel of the National Labor Relations Board, by the Regional Director for the Seventh Region of the Board, filed a complaint, alleging that Kessel Food Markets, the Petitioner herein, had violated the National Labor Relations Act. A hearing was scheduled for September 20, 1982. The Charging Parties in the unfair labor practice proceeding, Locals 40 and 539 of the United Food & Commercial Workers International Union (Local 40 has since merged with Local 876), requested that the Board authorize the seeking of interim injunctive relief, in accordance with 29 U.S.C. §160(j), §10(j) of the Act. This request was considered by the Board, which examines §10(j) requests to determine whether there is reasonable cause to believe that the Act has been violated and whether there will be irreparable injury if temporary relief is not sought and granted. *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979). The Board authorized the seeking of an injunction against the Petitioner. The matter was then referred back to the Regional Director of the Seventh Region, Bernard

Gottfried, who on July 9, 1982 filed a complaint in the United States District Court for the Eastern District of Michigan seeking injunctive relief. (Appendix p. A137) The Regional Director declared in his sworn complaint that he had reasonable cause to believe that the Act was violated in the ways set forth in the March 16, 1982 administrative complaint.

The Board withdrew its request for §10(j) injunctive relief on September 10, 1982, after the district judge ordered extensive discovery. The trial commenced on September 20, 1982, and continued in 1982, and in 1983, for approximately 20 hearing days. The General Counsel presented witnesses whom Petitioner Kessel cross-examined. Petitioner Kessel called numerous witnesses in its own behalf. Petitioner Kessel filed an extensive brief to the administrative law judge and later to the National Labor Relations Board, arguing that it had not violated the Act. The administrative law judge, and then later the Board, found that some of the alleged violations had occurred and found that other of the alleged violations had not occurred. The Sixth Circuit Court of Appeals affirmed.

ARGUMENT

Locals 876 and 539, United Food & Commercial Workers International Union, respectfully pray that Kessel Food Markets' petition for a writ of certiorari be denied. There are no special and important reasons for granting it. The courts of appeal are in agreement on the issue presented. There is no important question of federal law. The decision of the Court of Appeals is fully consistent with all applicable decisions of this Court.

A. The Board Did Not Prejudge Kessel.

Kessel misstates a critical fact in its petition to this Court. Kessel says that the National Labor Relations Board (the Board or NLRB) declared in its District Court pleadings that it believed that Kessel had violated the law. In fact, the Board did not make any declaration. The Board did not itself file the district court action. The statements to which Kessel refers were made by the Regional Director of the Seventh Region of the Board.

§10(j) of the National Labor Relations Act, 29 U.S.C. §160(j), requires that the Board authorize the seeking of §10(j) interim relief. The test applied by courts in determining the propriety of §10(j) relief is whether there is reasonable cause to believe that unfair labor practices have been committed and that irreparable injury will ensue in the absence of such relief. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975); *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979). This is, of course, the standard which the NLRB applies in deciding whether to authorize the seeking of such relief and it is presumably the standard which was applied in the instant case. Having made the decision to seek §10(j) relief, the Board referred the matter back to the Regional Director and it was he who initiated the suit. As can be seen from the first page of the district court pleadings, A137 of the Appendix, it was Bernard Gottfried, Regional Director of the Seventh Region of the NLRB, who was the petitioner. In the pleadings Mr. Gottfried stated that he had reasonable cause to believe that the charges of unfair labor practices were true. There is absolutely no indication that the Board made any determination other than that there was reasonable cause to believe that the Act was violated.[1]

B. Even If The Board Had Made A Preliminary Determination That The Act Was Violated This Would Not Have Deprived Kessel of Due Process.

The Sixth Circuit Court of Appeals relied upon and extensively quoted from this Court's decision in *Withrow v. Larkin*, 421 U.S. 35 (1975), wherein this Court held that a statutory scheme which combined investigatory and adjudicatory functions did not deprive the complainant of due process. Kessel's asserted reliance upon *Withrow* is totally misplaced and rests

[1] Furthermore, there was complete turnover on the five person Board between August, 1982, when the §10(j) petition was authorized, and December, 1987, when the Board's decision issued, so the persons who decided the case had, in fact, never previously considered it. The 47th annual report of the NLRB for fiscal year ending September 30, 1982 lists the Board members as VanDerWater, Fanning, Zimmerman, Jenkins and Hunter. The 52nd annual report of the NLRB for fiscal year ending September 30, 1987 lists the Board members as Dotson, Johansen, Stephens, Babson and Cracraft. (The decision in this case was signed by members Dotson, Johansen and Stephens.)

on a few quotations taken out of context. In *Withrow*, it was observed that it was common for a judge to preside over a matter where he had previously decided whether to grant temporary relief and, further, that "[i]t is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings." *Id.* at 56. These situations would not establish impermissible prejudgment because at the eventual hearing there would be the opportunity to fully litigate the matter.

Withrow relied on *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1947), which fully supports the decision of the Sixth Circuit below. In *Cement Institute* the cement companies argued for the disqualification of the FTC as the adjudicator of complaints against them alleging unfair methods of competition. They cited reports made by the FTC commissioners to Congress and testimony made by some of the commissioners in which they had stated that the method of pricing used in the cement industry was a violation of the Sherman Act. This Court said that it would assume that all of the commissioners had formed the opinion that the companies' conduct violated the law, and then went on to conclude that such opinions would not require the disqualification of the FTC. The Court concluded that the entertainment of views of guilt, resulting from the investigations, would not indicate irrevocably closed minds, and observed that the companies would have the opportunity to fully litigate the charges against them and to convince the FTC that their business practices were valid.[2]

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[2] *Withrow v. Larkin* and *FTC v. Cement Institute* were relied upon by this Court in *Hortonville Dist. v. Hortonville Ed. Assoc.*, 426 U.S. 482, 493 (1976), where the Court said, "Nor is a decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' *"United States v. Morgan*, 313 U.S. 409, 421 (1941)." In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court again relied on *Cement Institute* and observed that only in the most extreme cases of bias or prejudice would disqualification be constitutionally required.

In the instant case, Kessel had the opportunity at extended unfair labor practice hearings to present witnesses, to cross-examine witnesses presented by the General Counsel, to submit documentary evidence, and to argue both orally and in extensive briefs that its conduct was not violative of the National Labor Relations Act. The Board did not impermissibly prejudge the matter simply by authorizing the Regional Director to seek interim relief prior to the unfair labor practice trial. The two courts of appeal which have considered this issue have held that the §10(j) procedure did not deprive litigants of due process. *NLRB v. Sanford Home for Adults*, 669 F.2d 35 (2nd Cir. 1981); *Eisenberg v. Holland Rantos Co.*, 234 N.L.R.B. 726, aff'd, 583 F.2d 100, 104 n.8 (3rd Cir. 1978). There is no contrary appellate court authority.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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